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From Quantification to Qualification: A State Court's Distortion of the Law in *In re General Adjudication of All Rights to Use Water in the Big Horn River System*

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FROM QUANTIFICATION TO QUALIFICATION: A STATE COURT'S DISTORTION OF THE LAW IN *IN RE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM*

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Abstract: The Wyoming Supreme Court applied state law to Indian reserved water rights in its recent decision in *In re General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn III).* Prior to *Big Horn III,* courts never applied state law to such rights. This Note argues that the Wyoming decision contradicts federal reserved water rights law and federal Indian law, and concludes that Congress should enact legislation overturning the *Big Horn III* decision.

Indian tribes lost virtually all their land and other resources when white settlers moved across the United States during the 1800s. Federal Indian law protects the limited resources that the tribes possess today, primarily by promoting the tribal right of self-determination. Many areas of federal Indian law, including Indian water rights law, reflect the tribal right of self-determination. The recent Wyoming Supreme Court decision in *In re General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn III),*[1] however, contradicts Indian water rights law and undermines tribal self-determination.

In *Big Horn III,* the Shoshone and Northern Arapaho Tribes attempted to protect and enhance their resources on the Wind River Indian Reservation by dedicating a portion of their water to instream flow.[2] The Wyoming court determined that the Tribes did not have the right to make such a dedication of their water.[3] The Wyoming court applied state law when it should have applied federal law, and misapplied the federal law on which it relied. The court determined the *purposes* for which the Tribes could use their water (qualification) by applying a method courts have developed for determining the *amount* of water allocable to tribes on reservations (quantification).[4] The Wyoming court's limitation of the Tribes' use of their water contradicts tribal self-determination and denigrates the sovereignty of Indian tribes. The decision, therefore, is adverse not only to federal

1. 835 P.2d 273 (Wyo. 1992).
2. *Id.* at 275.
3. *Id.* at 279.
4. *Id.* at 278–79.

water law, but also to the federal policy promoting tribal self-governance and economic self-sufficiency.

The history of water law and Indian water rights in the United States clearly clashes with the Wyoming Supreme Court's decision in *Big Horn III*. *Big Horn III* undermines legal precedent and federal Indian policy, and injects uncertainty into reserved water rights which exist under federal law and should not vary among the states. Congress should enact legislation to reverse *Big Horn III* and to prevent other states from making similar decisions in the future. Such legislation should clarify that tribes, and not states, have authority to administer reserved water rights on Indian reservations. If Congress does not act, states will continue to apply laws and policies that undermine tribal rights.

I. STATE WATER LAW AND FEDERAL RESERVED WATER RIGHTS

Big Horn III involves principles of both water law and federal Indian law. Water law is comprised of both state and federal doctrines. The dual state and federal water law doctrines caused much of the controversy behind *Big Horn III*. Federal Indian law also plays an important role in defining Indian water rights because the federal government has a duty to treat Indian rights with deference.

A. The Duality of Water Law in the Western States: Prior Appropriation and Reserved Rights

There are two basic kinds of water rights in the western United States: prior appropriation rights and reserved rights.[5] Appropriation rights exist under state law, while reserved rights exist under federal law, specifically, federal common law. The reserved rights doctrine was first recognized by the United States Supreme Court in *Winters v. United States*,[6] and has not been codified by Congress. State and federal water laws conflict in some areas of water law, including quantification and administration of water rights, yet state courts have jurisdiction to adjudicate reserved water rights.

5. The eastern states also recognize riparian water rights. For a discussion of riparian water rights, see 1 WATERS AND WATER RIGHTS § 6.01 (Robert E. Beck et al. eds., 5th ed. 1991).

6. 209 U.S. 564 (1908).

1. *The Basics of Prior Appropriation: "First-in-Time" and Beneficial Use*

Prior appropriation is the primary water rights allocation system of the western states.[7] These states have long recognized water as a scarce resource,[8] and use the prior appropriation system to administer it. The prior appropriation system gives a water right to whoever first appropriates the water[9] for a "beneficial use,"[10] which is defined by state law. Beneficial use traditionally required a diversion of water;[11] the appropriator had to divert the water from its natural stream. "Instream flow" does not fit the traditional definition of beneficial use, because it is undiverted water that remains in its natural stream.[12] Consequently, water rights appropriators traditionally could not use their water as instream flow. The modern trend, however, includes instream flow in the definition of beneficial use.[13]

Under state law, beneficial use defines the extent of the prior appropriation water right.[14] A water right holder may appropriate only the quantity of water that the holder can put to a beneficial use. Additionally, the water user must continue the beneficial use to maintain a prior appropriation right.[15]

2. *The Origin of Reserved Water Rights Law: The* Winters *Doctrine*

Unlike state regulated prior appropriation rights, reserved water rights exist under federal law. The United States Supreme Court first recognized Indian reserved water rights in 1908, in *Winters v. United*

7. Lee H. Storey, *Leasing Indian Water Off the Reservation: A Use Consistent with the Reservation's Purpose,* 76 CAL. L. REV. 179, 185 (1988).

8. *See* D. Craig Bell & Norman K. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, the Prospects for Accommodation,* 21 ENVTL. L. 1, 4 (1991).

9. This rule is commonly referred to as first-in-time equals first-in-right. *See id.* at 5; David H. Getches, *Water Rights on Indian Allotments,* 26 S.D. L. REV. 405, 407–08 (1981).

10. *See* Bell & Johnson, *supra* note 8, at 5; Getches, *supra* note 9, at 407–08.

11. *See, e.g., In re* General Adjudication of All Rights to Use Water in the Big Horn River System, 835 P.2d 273, 279 (Wyo. 1992) [hereinafter *Big Horn III*]; *see also* Getches, *supra* note 9, at 407–08; Matthew J. McKinney, *Instream Flow Policy in Montana: A History and Blueprint for the Future,* 11 PUB. LAND L. REV. 81, 81 n.1 (1990).

12. *See* McKinney, *supra* note 11, at 81 n.2.

13. *Big Horn III,* 835 P.2d at 279 (citing Rick A. Thompson, Comment, *Statutory Recognition of Instream Flow Preservation: A Proposed Solution for Wyoming,* 17 LAND & WATER L. REV. 139, 143 (1982)).

14. Bell & Johnson, *supra* note 8, at 5.

15. The beneficial use doctrine allows water rights to expire. If a water right holder does not use the water, then the right expires and someone else can claim the water right. *See id.* (referring to the "use-it-or-lose-it" principle).

States.[16] In that case, the Supreme Court held that the federal reservation of land for the Fort Belknap Indian Reservation included an implicit reservation of water necessary to carry out the purposes of the land reservation.[17] The Court established the reserved water rights doctrine, which implies a water right on any federally reserved land which needs water to carry out the purposes of the reservation. The water right dates back to the federal reservation of the land, and is superior to subsequently granted state water rights.[18] The *Winters* Court, however, did not quantify the water reserved.[19]

3. *Quantification of the Reserved Water Right*

Subsequent to the *Winters* Court's recognition of the reserved water right, other courts have developed methods of quantifying reserved water rights.[20] The Supreme Court supports the primary purpose test for quantifying non-Indian reserved water rights, and the practicably irrigable acreage test (PIA test) for quantifying Indian reserved water rights. Quantification of federal reserved water rights allows the state to allocate remaining available water to state users. Because reserved water rights are superior to subsequent water rights granted under state law, reserved water rights must be quantified so that state water rights holders can predict their water supply. In Arizona, for instance, the state entered into an agreement with the Papago Tribe,

16. 207 U.S. 564 (1908). Because of its origin in *Winters*, the reserved water rights doctrine is commonly called the *Winters* doctrine and the right is called the *Winters* right.

17. *Id.* at 576–77.

18. *See id.* at 577. For further discussion of the superiority of the *Winters* right, see Thomas H. Pacheco, *How Big Is Big? The Scope of Water Rights Suits Under the McCarran Amendment*, 15 ECOLOGY L.Q. 627, 630–31 (1988) (citing Cappaert v. United States, 426 U.S. 128, 138 (1976)).

The *Winters* doctrine is not limited to Indian reservations, but applies to any federal reservation of land. Arizona v. California, 373 U.S. 546, 601 (1963). For a general discussion of the differences between Indian reserved water rights and other federally reserved water rights, see FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 582–85 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

19. *Cf. In re* General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76, 96 (Wyo. 1988) (quantifying Indian reserved water rights), *cert. granted in part*, 488 U.S. 1040, *and aff'd by an equally divided Court sub nom.* Wyoming v. United States, 492 U.S. 406 (1989) (per curiam) [hereinafter *Big Horn I*].

20. Quantification refers to how much water is reserved for a federal land reservation. Qualification, by contrast, refers to how that water can be used. *See infra* notes 36–39 and accompanying text (describing the Court's refusal to qualify Indian reserved water rights). Quantification becomes important when the number of water rights holders exceeds the amount of allocable water. Not all water rights holders will be able to use as much water as they are entitled to when demand exceeds the water supply.

which Congress codified, that permitted the Papago to sell their excess water to the state.[21]

a. The Primary Purpose Test for Quantifying Reserved Water Rights

Quantifying reserved water rights is difficult because most entities have not asserted their right to the water prior to an adjudication. Courts have developed a "primary purpose" test to overcome this difficulty.[22] The test involves two steps. The court first determines the federal government's intended use for the reserved land. The federal government's intended use at the time the reservation was created is the "primary purpose" of the reservation. The court then determines whether water was necessary for that primary purpose. If so, the court finds a reserved water right for the reserved land.[23]

The United States Supreme Court has supported the primary purpose test for determining reserved water rights on non-Indian federal reservations.[24] In *United States v. New Mexico,*[25] for instance, the Supreme Court used the "primary purpose" test to quantify the federal government's reserved water right for the Gila National Forest.[26] Some lower courts have applied the primary purpose test to determine reserved water rights on Indian reservations. These courts generally find that the primary purpose of the Indian reservation is either hunting and fishing, or agriculture.[27] The Supreme Court, however, has never applied the primary purpose test to an Indian reservation.

Some courts have found a general homeland purpose for Indian reservations.[28] The general homeland purpose is more difficult to quantify than hunting and fishing, or agriculture, because it is not limited

21. *See* Nancy K. Laney, *Transferability Under the Papago Water Rights Settlement,* 26 ARIZ. L. REV. 421, 430 (1984) (non-Indian interests provided impetus for negotiations of Papago Tribe's reserved water right); *see also* John E. Thorson, *Resolving Conflicts Through Intergovernmental Agreements: The Pros and Cons of Negotiated Settlements, in* INDIAN WATER 1985: COLLECTED ESSAYS 25, 36 (Christine L. Miklas & Steven J. Shupe eds., 1986).

22. *See, e.g.,* United States v. New Mexico, 438 U.S. 696, 700 (1978). The Supreme Court did not use the phrase "primary purpose test," but subsequent courts have so dubbed the test. *See, e.g., Big Horn III,* 835 P.2d 273, 278 (Wyo. 1992).

23. United States v. New Mexico, 438 U.S. at 700–02.

24. *Id.; see also* Cappaert v. United States, 426 U.S. 128, 139–41 (1976).

25. 438 U.S. 696 (1978).

26. *Id.* at 716–18; *see also supra* note 22.

27. *See, e.g.,* United States v. Adair, 723 F.2d 1394, 1409 (9th Cir. 1983), *cert. denied,* 467 U.S. 1252 (1984) (finding primary purposes to be both agriculture, and hunting, fishing, and gathering); *Big Horn I,* 753 P.2d 76, 97 (Wyo. 1988) (finding agriculture to be the primary purpose of the Wind River Reservation).

28. *See, e.g.,* Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir.), *cert. denied,* 454 U.S. 1092 (1981).

to one primary use. Rather, the general homeland purpose recognizes that Indian reservations were not set aside for mere economic survival, but for broader benefits to Indian tribes.[29] When a court finds a general homeland purpose under the primary purpose test, it must allow the tribes to use their water for various purposes. This makes the primary purpose test similar to the PIA test which the Supreme Court applies to Indian reservations.

b. *The Practicably Irrigable Acreage Test for Quantifying the Reserved Water Rights on Indian Reservations*

The Supreme Court has supported the PIA test for quantifying reserved water rights when an Indian reservation's primary purpose is agriculture.[30] The Court first determines the quantity of water necessary to irrigate all the practicably irrigable acres on the reservation, and then awards that amount as the reserved water right.[31] Quantification, therefore, includes not only the water necessary to irrigate presently farmed land, but also the water necessary to irrigate other areas of land that could be converted to farmland.[32]

The United States Supreme Court first affirmed the use of the PIA test in *Arizona v. California,*[33] when the Court adjudicated the rights of several states and the United States to the waters of the Colorado

29. *Id.* at 49. One commentator argues that the general homeland purpose includes changing needs and developments of the tribes. Just as the citizens of states change industries and develop new ways of life, so should Indian tribes be able to experience these changes and have the water to meet their new needs for it. *See* Note, *Indian Reserved Water Rights: The* Winters *of Our Discontent,* 88 YALE L.J. 1689, 1700 (1979).

The federal government created Indian reservations in two ways. Congress created reservations primarily through ratification of treaties with Indian tribes, and the executive branch created reservations through executive orders. *See* COHEN, *supra* note 18, at 127–28. Hereinafter, any reference to congressional reservation of lands refers also to executive orders.

The government did not restrict the use of the land it reserved for Indian tribes. Congress did promote the practice and development of western European culture, such as agriculture, among the tribes, but it did not restrict tribal decisions about land use. *See, e.g. Big Horn I,* 753 P.2d at 97–98. For a discussion of the imposition of European culture on Indian tribes, see generally Robert A. Williams, Jr., *Columbus's Legacy: The Rehnquist Court's Perpetuation of European Cultural Racism Against American Indian Tribes,* 39 FED. B. NEWS & J. 358 (1992).

30. *See* Arizona v. California, 373 U.S. 546, 600–01 (1963). The United States Supreme Court affirmed the use of the PIA test more recently in Wyoming v. United States, 492 U.S. 406 (1989). Where the purpose of the reservation is other than to promote agriculture, another method of quantifying would be necessary. Getches, *supra* note 9, at 410–11.

31. Arizona v. California, 373 U.S. at 600–01.

32. *Big Horn I,* 753 P.2d at 100–01; *see also* Arizona v. California, 373 U.S. at 600–01. This measure includes future water needs. *See Big Horn III,* 835 P.2d 273, 276 (Wyo. 1992) (discussing the "future project water").

33. 373 U.S. 546, 600–01 (1963).

River.[34] The *Arizona* Court affirmed the United States' right to reserve waters for Indian reservations.[35] The Court also held that the PIA test was the only "feasible and fair way"[36] to quantify the tribal water rights because the Court could not assess the future water needs of the Indian tribes at the time of its decision.[37] In a supplemental decree, the Supreme Court stated that the measure only applied to quantification, and did not restrict tribal use of water.[38] Tribes could use their water for purposes other than irrigation as long as the use did not exceed the quantified amount of water.[39] The PIA test is used only to quantify, not to qualify, an Indian reserved water right.

4. State Jurisdiction over Reserved Water Rights

Once a court quantifies a reserved water right, it must determine who will administer and regulate the water right. Generally, tribal sovereignty and federal Indian law both preempt states from exercising jurisdiction over Indians and Indian property in Indian country.[40] The United States Supreme Court first recognized this general preemption in *Worcester v. Georgia*[41] in 1832. In *Worcester*, the state of Georgia attempted to restrict residence on the Cherokee Reservation. The Court held that Georgia could not make such restrictions, because state law was not valid on the Reservation.[42] More recently, the Court has relied on preemption to prohibit state taxation of Indian property on reservation lands.[43] These holdings make it clear that the tribes enjoy limited sovereignty.[44] Thus, the states generally cannot interfere with real and personal property belonging to tribes,[45] including reserved water rights.[46]

As part of the preemption finding, the Supreme Court recognized Congress' trust duty to protect Indian tribes from state regulation.[47]

34. *Id.* at 550–51.
35. *See id.* at 598.
36. *Id.* at 601.
37. *Id.*
38. Arizona v. California, 439 U.S. 419, 422 (1979).
39. *Id.*
40. COHEN, *supra* note 18, at 270, 349, 582.
41. 31 U.S. 515 (1832). *But see* New Mexico v. Mescalero, 462 U.S. 324, 331 (1983) (acknowledging limitations on tribal sovereignty).
42. *Worcester*, 31 U.S. at 561.
43. McClanahan v. State Tax Comm'n, 411 U.S. 164, 172–77 (1973).
44. *See Worcester*, 31 U.S. at 559, 561.
45. *See* COHEN, *supra* note 18, at 349.
46. Reserved water rights are property rights. *See id.* at 576.
47. *See id.* at 220–25; *see also McClanahan*, 411 U.S. at 169–71 (implementing the canons relating to the trust duty as described in COHEN, *supra* note 18).

Under this trust duty, Congress must act in the best interest of the tribes.[48] Consequently, Congress provides broader protection for Indian water rights than for other reserved water rights.[49] Unless Congress states otherwise, tribal sovereignty and federal Indian law preempt the states from controlling Indian reservations.[50] Congress may, however, allow states such control by delegating to them limited power over Indian tribes.[51]

Notwithstanding Congress' trust duty, states gained limited jurisdiction over federal reserved water rights when Congress passed the McCarran Amendment in 1952.[52] Prior to the McCarran Amendment, the federal and Indian reserved water rights were thought immune from state and federal court actions.[53] The McCarran Amendment, however, provided a limited waiver of federal sovereign immunity.[54] After the Amendment, both federal and state courts can adjudicate federal reserved water rights.[55] Therefore, a state can now adjudicate all water rights existing within the state's boundaries.[56] Similarly, a federal court can dismiss a federal action in favor of a state proceeding, although it is not required to do so.[57]

The McCarran Amendment does not change substantive water law. The Amendment is strictly a procedural device to allow courts to exercise jurisdiction over reserved water rights holders in a general water rights adjudication.[58] Legislative attempts since the McCarran

48. *See* COHEN, *supra* note 18, at 220–25; *see also* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (referring to Indian tribes' relationship with the United States as similar to that of a "ward to his guardian").

49. *See* COHEN, *supra* note 18, at 583–84; *Cherokee Nation,* 30 U.S. at 17 (referring to Indian tribes as "domestic dependent nations").

50. *See McClanahan,* 411 U.S. at 170–71 (quoting U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 845 (1958)); *see also* Susan Williams, *Indian* Winters *Water Rights Administration: Averting New War,* 11 PUB. LAND L. REV. 53, 58 (1990). *But cf.* United States v. Anderson, 736 F.2d 1358, 1366 (9th Cir. 1984) (holding that the state could regulate *non-Indian, surplus* water rights on the Spokane Indian Reservation).

51. *See* COHEN, *supra* note 18, at 349, 361.

52. 43 U.S.C.A. § 666 (West 1986).

53. Note, *supra* note 29, at 1708–09 n.109 (citing Brief for the United States at 8–19, United States v. District Court for Eagle County, 401 U.S. 520 (1971) (No. 87)).

54. 43 U.S.C.A. § 666 (West 1986); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 809–10 (1976).

55. *Colorado River,* 424 U.S. at 809.

56. United States v. District Court for Eagle County, 401 U.S. 520, 524 (1971).

57. United States v. Adair, 723 F.2d 1394, 1400–02 (9th Cir. 1983), *cert. denied,* 467 U.S. 1252 (1984). Factors relevant to the district court judge's decision whether to dismiss include whether questions of federal law need to be determined, and whether duplication or waste of judicial resources would occur as the result of either a dismissal or going forward with the federal court action when a state action is pending. *See id.* at 1404.

58. *See* Cappaert v. United States, 426 U.S. 128, 145–46 (1976).

Amendment to subject federally reserved water to substantive state control have failed.[59] Absent legislation to the contrary, federal law still determines the scope and use of federal reserved water rights.[60]

B. Tribal Self-Determination and Self-Governance

In addition to leaving federal water law untouched, the McCarran Amendment did not alter congressional policies promoting tribal self-determination and self-governance. The Indian Reorganization Act (IRA) of 1934[61] enunciates these policies and attempts to redress Congress' previous disastrous policies of removal and assimilation.

Congress supported policies of removal[62] and assimilation[63] in the 1800s. In the early 1800s, Congress opened up the eastern United States to white settlers by removing Indian tribes to the West and erasing the boundaries of their homelands.[64] After removing most of the eastern tribes to the western United States, the federal government established reservations in the West, confining Indians to less land in order to provide more land for the white settlers.[65]

After establishing reservations, Congress enacted the General Allotment Act (GAA)[66] in 1887 to break up the reservations and assimilate Indians as ordinary citizens. The GAA program divided the reservations into plots, providing a fixed amount of reservation land to each tribal Indian.[67] The United States subsequently purchased the "sur-

59. *See* Note, *supra* note 29, at 1703–04; *see also Cappaert,* 426 U.S. at 145.

60. *See* United States v. District Court for Eagle County, 401 U.S. at 526. The Supremacy Clause of the Constitution provides for supremacy of federal laws over inconsistent state law. U.S. CONST. art. VI, § 2. The Ninth Circuit found federal law preemptive of state law in the context of Indian water rights in Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir.), *cert. denied,* 454 U.S. 1092 (1981). In *Walton,* the court noted that the Indian reserved water right was superior to state rights and not subject to state laws of appropriation. *Id.* at 46.

61. 25 U.S.C.A. §§ 461–479 (West 1983) [hereinafter IRA].

62. The policy of removal was codified by the Indian Removal Act, 25 U.S.C.A. § 174 (West 1983).

63. The policy of assimilation was codified by the Dawes Indian General Allotment Act, 25 U.S.C.A. §§ 331–334, 339, 341, 342, 348, 349, 354, 381 (West 1983) [hereinafter GAA].

64. COHEN, *supra* note 18, at 78–79. Indians were threatened with subjection to state jurisdiction if they did not emigrate from their homelands in the eastern region of the United States. *Id.* at 81.

65. The tribes agreed to these reservation treaties primarily in exchange for the promise of protection by the federal government. Many of these treaties had guaranteed protection from state control. *See, e.g., id.* at 87 (describing the 1825 treaty with the Choctaws). A group of treaties negotiated in 1851 with the California tribes was written to allow state jurisdiction over the Indian reservations, but these treaties were never ratified because the California state legislature protested the assignment of lands to the tribes. *Id.* at 97.

66. GAA, *supra* note 63.

67. *See* COHEN, *supra* note 18, at 130–31.

plus" land on the reservation and sold it to white settlers.[68] Indian tribes ultimately lost ninety million acres under the GAA program.[69]

When Congress finally recognized the tragedy and injustice of the removal and assimilation eras, federal policy shifted and Congress passed the IRA in 1934.[70] The IRA attempted to encourage economic development, cultural plurality, and tribalism.[71] It also attempted to improve economic conditions and halt further tribal land loss.[72] To further these goals, Congress promoted tribal self-determination and self-governance.[73]

Although the federal government currently follows the policies codified in the IRA, the Termination Era of the 1940s and 1950s caused a break in the policy.[74] Termination policy sought an end to the trust relationship between the United States and Indian tribes, and Congress once again attempted to assimilate Indians as ordinary citizens of the United States.[75] However, the civil rights movement of the 1950s and 1960s led to the federal government's reaffirmation of the policy of self-determination.[76] After President Nixon's Special Message to Congress on July 8, 1970 urging Congress to repudiate its tribal termination policy, Congress enacted new legislation reviving self-determination.[77] The President's message and the subsequent legislation resulted from a decade of the presence of Indian issues in the political arena.[78] The Menominee Restoration Act of 1973[79] symboli-

68. *See id.* at 137–38. Instead of dividing the reservations equally among the tribal members, the federal government allotted a predetermined acreage to each Indian. The number of acres given to each allottee diminished as the program progressed. *See* 25 U.S.C.A. § 331 historical note (West 1983). For a more detailed discussion of the GAA program, see COHEN, *supra* note 18, at 130–38.

69. Total Indian lands shrank from 138 million acres in 1887 to 48 million acres in 1934. COHEN, *supra* note 18, at 138. In addition to the tremendous land loss, the GAA devastated tribalism and native cultures. For a discussion of these effects, see generally Williams, *supra* note 29, at 363–67.

70. IRA, *supra* note 61.

71. COHEN, *supra* note 18, at 147 (citing session hearings). The stated purpose of the IRA was "[t]o conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes." S. 3645, 73d Cong., 2d Sess. (1934).

72. COHEN, *supra* note 18, at 147.

73. *Id.* at 149.

74. See *id.* at 152–80 for a thorough discussion of the Termination Era.

75. *See id.* at 164.

76. *Id.* at 180.

77. *Id.* at 185–87.

78. *Id.* at 182–88.

79. 25 U.S.C.A. §§ 903–903f (West 1973) (repealing §§ 891–902).

cally reversed the termination policy and reinstated the policy of tribal self-determination.[80]

II. *IN RE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM (BIG HORN III)*

Big Horn III challenges the federal preemption of state law on Indian reservations.[81] The case is the latest in a series of cases adjudicating water rights in the Big Horn river system. The three *Big Horn* cases have attempted to determine who has the right to use water in the Big Horn river system, and also to quantify and administer those rights. *Big Horn III* asserts that states have jurisdiction over all of these functions.

In *Big Horn I,*[82] the first in this series of cases, the court determined and quantified the Shoshone and Northern Arapaho Tribes' water right. The Wyoming court interpreted the treaty creating the Wind River Indian Reservation, and concluded that agriculture was the Reservation's primary purpose.[83] The court then quantified the Shoshone and Northern Arapaho Tribes' reserved water right using the PIA test.[84] Several parties appealed the *Big Horn I* decision to the United States Supreme Court. The Supreme Court granted certiorari only on the question of whether the PIA test was the proper method for quantifying the reserved water right.[85] The Court affirmed the state court's use of the PIA method,[86] but it did not address other parts of the *Big Horn I* decision.[87]

After *Big Horn I,* the Shoshone and Northern Arapaho Tribes sought to administer their water right and dedicated a portion of their

80. COHEN, *supra* note 18, at 186–87. More recent legislation reaffirming self-determination policy includes the Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C.A. §§ 450–450n, 455–458e (West 1983), and the Indian Child Welfare Act of 1978, 25 U.S.C.A. §§ 1901–1963 (West 1983). *See* COHEN, *supra* note 18, at 194–96.

81. *Big Horn III,* 835 P.2d 273, 275 (Wyo. 1992).

82. 753 P.2d 76 (Wyo. 1988).

83. The *Big Horn I* court determined the primary purpose by examining Congress' purpose for setting up the reservation: to encourage the tribes to develop an agricultural lifestyle. *Id.* at 97; see *supra* text accompanying notes 22–27 for a discussion of primary purpose.

84. *Big Horn I,* 753 P.2d at 100–01; see *supra* text accompanying notes 30–39 for a discussion of the PIA test.

85. Wyoming v. United States, 488 U.S. 1040 (certiorari granted in part, "limited to Question 2"), *cert. denied in part,* 492 U.S. 926 (1989).

86. Wyoming v. United States, 492 U.S. 406 (1989) (per curiam) (4-4 decision).

87. For further discussion of this partial review, see Walter Rusinek, *A Preview of Coming Attractions?* Wyoming v. United States *and the Reserved Rights Doctrine,* 17 ECOLOGY L.Q. 355, 393–94 (1990).

water to instream flow for fisheries and other purposes.[88] The tribal water board issued a permit for the instream flow dedication pursuant to their water code, and presented it to the state engineer, who administed all water rights in the state.[89] The state engineer refused to enforce the permit, and the Tribes brought suit in the Wyoming state court.[90] The state court in *Big Horn III* held that the Tribes had the right to dedicate a portion of their water to instream flow.[91] The court also held that the Tribes had the right to administer their own water right on the Reservation.[92] The State appealed this decision to the Wyoming Supreme Court.

The Wyoming Supreme Court in *Big Horn III,* by a split vote, reversed. The court held that the Shoshone and Northern Arapaho Tribes have no unfettered right to dedicate their water to instream flow.[93] The court held that under *Big Horn I,* the Tribes only had the right to use their reserved water for irrigation.[94] The court reasoned that since *Big Horn I* determined that the primary purpose of the Reservation was agriculture, and then used the PIA test to quantify the reserved water right, the Tribes could only use their water for agricultural purposes.[95] The Wyoming Supreme Court also held that the state engineer had the authority to administer the reserved water right on the Wind River Indian Reservation.[96] The lower court, it said, had unlawfully removed the state engineer from administration.[97]

The Wyoming Supreme Court asserted that any changes in the Tribes' water use had to conform to state law.[98] The court found

88. *Big Horn III,* 835 P.2d 273, 275 (Wyo. 1992).

In re General Adjudication of All Rights to Use Water in the Big Horn River System, 803 P.2d 61 (Wyo. 1990) (*Big Horn II*), determined the standing of non-Indian claimants who had not participated in the appeal of *Big Horn I.* The *Big Horn II* decision determined none of the issues involved in *Big Horn III,* and therefore will not be discussed.

89. *Big Horn III,* 835 P.2d at 275–76.

90. *Id.* at 276.

91. *Id.; In re* General Adjudication of All Rights to Use Water in the Big Horn River System, No. 4993, at 16 (Wyo. Dist. Ct. Washakie County filed Mar. 11, 1991) (conclusion of law no. 3) (on file with the *Washington Law Review*) [hereinafter District Court Opinion].

92. *Big Horn III,* 835 P.2d at 276; District Court Opinion, *supra* note 91, at 17 (conclusion of law no. 4).

93. *Big Horn III,* 835 P.2d at 278–79 (3 of 5 justices joined in this holding).

94. *Id.* at 278.

95. *See id.*

96. *See id.* at 282–83. This is not the same situation as that determined in United States v. Anderson, 736 F.2d 1358, 1366 (9th Cir. 1984), where the state was allowed to regulate *non-Indian, surplus* waters on the Spokane Indian Reservation.

97. *Big Horn III,* 835 P.2d at 282.

98. *Id.* at 279.

authority in *United States v. New Mexico*[99] for this assertion.[100] In *New Mexico,* the United States Supreme Court quantified the reserved water right for the Gila National Forest.[101] The *New Mexico* Court held that the federal government reserved only the amount of water necessary to fulfill the reservation's primary purpose.[102] If the government needed water only for a secondary purpose, it would be subject to the state law of appropriation.[103]

In addition, the *Big Horn III* court stated that although Wyoming recognizes instream flow as a beneficial use, only the state can own instream rights.[104] Under state law, all water right holders must divert the water or lose their water right, because a right holder's failure to divert leaves the water in instream flow, which the state owns.[105] Under Wyoming law, therefore, the Tribes could not dedicate a portion of their water to instream flow.[106] Essentially, the *Big Horn III* decision asserts that federally reserved water rights are subject to state law restrictions. Although the quantity of the Tribes' water right was determined in *Big Horn I,* the *Big Horn III* court has qualified the water right by limiting the Tribes' use of their own water.

III. THE *BIG HORN III* DECISION MISAPPLIES RESERVED WATER RIGHTS LAW

The *Big Horn III* decision is wrong for several reasons. First, the Wyoming Supreme Court erred by applying state law to a federal right. Second, the court applied the federal law incorrectly. It used quantification methods to qualify the reserved water right. Third, the court incorrectly determined that the Shoshone and Northern Arapaho Tribes could not dedicate a portion of their water to instream flow. Finally, the court erred in granting the state engineer authority to administer the reserved water on the Wind River Indian Reservation. State administration of the tribal water right interferes with tribal government.[107]

99. 438 U.S. 696 (1978).

100. *Big Horn III,* 835 P.2d at 278.

101. United States v. New Mexico, 438 U.S. at 698.

102. *Id.* at 702.

103. *Id.*

104. *Big Horn III,* 835 P.2d at 279 (citing WYO. STAT. § 41-3-1002(e) (Supp. 1991)).

105. *Id.* at 279–80.

106. *Id.* at 279.

107. The Wyoming court's action may also constitute a taking of the Tribes' reserved water right. *See* Ann Kadlecek, Note, *The Effect of* Lucas v. South Carolina Coastal Council *on the Law of Regulatory Takings,* 68 WASH. L. REV. 415, 432–33 (1993) (discussing the possible

A. The Court Erred by Applying State Law

The *Big Horn III* court contradicts well-settled federal water law. The court failed to apply federal water law and instead applied state law to the Shoshone and Northern Arapaho Tribes' reserved water right. The United States Supreme Court has consistently held that federal reserved water rights are governed by federal law.[108] Substantive state law only applies when Congress specifically delegates federal plenary powers over the law to the state.[109] Congress had not delegated to Wyoming any power over the substantive reserved water rights law at issue in *Big Horn III.* The Wyoming Supreme Court, therefore, specifically contradicted United States Supreme Court precedent when it applied Wyoming substantive water law to the Tribes' reserved water right.

1. Misapplication of United States v. New Mexico

The Wyoming Supreme Court claims that under *United States v. New Mexico,* federal law does not preempt state control over tribal water rights.[110] The court, however, misunderstands *New Mexico.* The *New Mexico* decision is not applicable to qualification of Indian reserved water rights for two reasons. First, the *New Mexico* Court dealt with the reserved water right for the Gila National Forest,[111] which is a non-Indian land reservation. The Supreme Court treats Indian reserved water rights with greater deference than other reserved water rights, because the federal government owes greater protection to Indian reserved water rights than other reserved water rights.[112] Second, the *Big Horn III* court restricts the use of a reserved water right, while the *New Mexico* Court only quantified a reserved water right. Unlike the Wyoming court's interpretation of the *New Mexico* decision, *New Mexico* actually quantified a federally reserved water right,[113] it did not qualify the use of that right.[114] *Big Horn III*

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decrease in the property unit examined in takings analysis, as suggested by Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992)).

108. *See, e.g.,* United States v. New Mexico, 438 U.S. 696, 702 (1978); Cappaert v. United States, 426 U.S. 128, 145–46 (1976); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 815–16 (1976); United States v. District Court for Eagle County, 401 U.S. 520, 526 (1971).

109. *See supra* text accompanying notes 50–51.

110. *Big Horn III,* 835 P.2d at 278–79.

111. United States v. New Mexico, 438 U.S. at 698.

112. *See supra* text accompanying notes 47–49.

113. *See supra* notes 101–03 and accompanying text.

114. United States v. New Mexico, 438 U.S. at 698.

qualified a reserved water right, it did not quantify the right. *New Mexico* is completely inapplicable to *Big Horn III.*[115]

2. *Misuse of the McCarran Amendment*

In *Big Horn I,* the Wyoming court properly asserted jurisdiction under the McCarran Amendment to determine the federal reserved water right attached to the Wind River Reservation.[116] The purpose of the McCarran Amendment is to allow just such an adjudication.[117] The *Big Horn III* court, however, went beyond the bounds of jurisdiction granted by the McCarran Amendment. It used its state adjudication jurisdiction to apply state law to the federal reserved water rights doctrine.

The inapplicability of state law provided the grounds for the Ninth Circuit's decision in *Colville Confederated Tribes v. Walton.*[118] The *Walton* court held that the State of Washington could not regulate the Indian reserved water right on the Colville Indian Reservation.[119] The court found that under the reserved rights doctrine, a reservation of water cannot be subjected to state appropriation law.[120] The reserved water is free from state appropriation because it is a superior right.[121] The *Walton* court upheld the Colville Confederated Tribes' right to administer their own water.[122]

The Shoshone and Northern Arapaho Tribes in *Big Horn III* did not seek water in excess of their right. If the Tribes sought to increase their water supply, then they might be subjected to the state law of appropriation.[123] The Tribes, however, sought only to administer their water right. They should not be subjected to state law.

B. *The Court Erred in Using the Quantification Methods to Qualify the Shoshone and Northern Arapaho Tribes' Reserved Water Right*

In addition to incorrectly applying state law, the Wyoming Supreme Court also misapplied federal law. The court misapplied the PIA and

115. Even if the *New Mexico* rule means that additional water desired by the Shoshone and Northern Arapaho Tribes must be appropriated under state law, the *New Mexico* decision does not apply state law to the Tribes' use of their reserved water. *See id.* at 699.

116. *Big Horn I,* 753 P.2d 76, 88 (Wyo. 1988).

117. *See supra* notes 52–57 and accompanying text.

118. 647 F.2d 42 (9th Cir. 1981).

119. *Id.* at 51.

120. *See id.* at 46.

121. *Id.*

122. *Id.* at 51.

123. *See supra* text accompanying notes 100–01.

primary purpose tests. In *Big Horn I,* the United States Supreme Court affirmed the PIA test as a means to *quantify* the Tribes' reserved water right.[124] The PIA test is only a quantification measure, not a means of qualifying a reserved water right.[125] In *Big Horn III,* the court used the PIA test to *qualify* the Tribes' use of their water right.[126] The *Big Horn III* court used the PIA test for the wrong objectives.

The Wyoming court in *Big Horn I* qualified the tribal reserved water right by holding that the water could not be leased off-reservation.[127] On review, the United States Supreme Court did not address this issue.[128] The Supreme Court only affirmed the use of the PIA test for quantifying the Tribes' reserved water right. The *Big Horn III* court misinterpreted *Big Horn I.* It construed the PIA test as a method for qualifying the Shoshone and Northern Arapaho Tribes' right to use their water, based on a Wyoming court holding in *Big Horn I* that the Supreme Court did not address. The Supreme Court's narrow holding in *Big Horn I* does not justify the *Big Horn III* court's application of the PIA test. The Wyoming court should not have relied on *Big Horn I* to support its limitation on the Tribes' use of their water.

The *Big Horn III* court also used the primary purpose test to qualify the Tribes' water right.[129] This use of the primary purpose test contradicts federal precedent and undermines Congress' attempts to provide permanent homelands for Indian tribes. The Supreme Court has used the primary purpose test only to quantify non-Indian reserved water rights.[130] The Supreme Court has never used the primary purpose test to qualify a water right,[131] nor has it ever used the primary purpose test even to quantify an Indian reserved water right. The Court's limitation on the use of the primary purpose test is consistent with the federal government's goals of providing permanent homelands for Indian tribes, since a permanent homeland requires water for more than just one "primary purpose."[132]

124. Wyoming v. United States, 492 U.S. 406 (1989).

125. *See supra* text accompanying notes 36–38.

126. *See Big Horn III,* 835 P.2d 273, 278 (Wyo. 1992).

127. *See Big Horn I,* 753 P.2d 76, 100 (Wyo. 1988).

128. *See supra* notes 85–87 and accompanying text (explaining the Court's partial affirmance of *Big Horn I*).

129. *Big Horn III,* 835 P.2d at 278–79.

130. *See supra* text accompanying notes 24–27.

131. *See, e.g., supra* notes 113–15 and accompanying text.

132. *See* Colville Confederated Tribes v. Walton, 647 F.2d 42, 47–49 (9th Cir.), *cert. denied,* 454 U.S. 1092 (1981).

Under federal law, tribes are not limited in the use of their reserved water.[133] The Supreme Court has not qualified tribal water rights, and the Wyoming court does not have the power to restrict the Shoshone and Northern Arapaho Tribes' use of their reserved water right.

C. *The Court Erred in Determining that Instream Flow Is Not a Beneficial Use Available to the Shoshone and Northern Arapaho Tribes*

The Wyoming Supreme Court determined that the Shoshone and Northern Arapaho Tribes could not dedicate a portion of their water to instream flow.[134] The court conceded that instream flow is a beneficial use,[135] but argued that it was not one available to the Tribes.[136] The court reasoned that because instream flow is a highly valued resource, Wyoming has the exclusive right to maintain the instream flows within the state.[137] The court claimed that under the Wyoming Constitution, the state owns all instream flows.[138] Therefore, the court held, the Tribes do not have a right to instream flow.[139]

Federal law is supreme and cannot be contradicted by state law.[140] The Shoshone and Northern Arapaho Tribes have a property right, granted under federal law, in the reserved water on the Wind River Indian Reservation.[141] The Wyoming Supreme Court ignored the federal reserved rights doctrine, determining that state ownership overrides reserved water rights. Federally reserved water rights have never been subject to state control. Absent delegation of such authority from Congress, Wyoming cannot assert regulatory power over the waters reserved for the Tribes on the Reservation.[142]

Not only does Wyoming have no right to prevent the Tribes from dedicating their water to instream flow, it also stands to benefit from the Tribes' dedication. The State will receive two types of benefits created by the Shoshone and Northern Arapaho Tribes' instream flow

133. *See supra* notes 38–39 and accompanying text.

134. *Big Horn III,* 835 P.2d 273, 279–80 (Wyo. 1992).

135. *Id.* Instream flow benefits water rights holders and society generally by providing a variety of social, economic, and environmental benefits. *See* McKinney, *supra,* note 11, at 83; A. Dan Tarlock, *New Commons in Western Waters, in* WATER AND THE AMERICAN WEST 69, 71–73 (David H. Getches ed., 1988).

136. *Big Horn III,* 835 P.2d at 279.

137. *Id.* at 279–80.

138. *Id.*

139. *Id.* at 279.

140. *See supra* note 60 and accompanying text.

141. *See supra* text accompanying notes 45–46.

142. *See supra* text accompanying notes 50–51.

dedication. Instream flow has a value of its own, which will benefit the State generally.[143] The Tribes' dedication to instream flow also prevents them from diverting all the water to which they are entitled. The quantity of reserved water is greater than the water flow remaining after all state water users exercise their water rights.[144] Therefore, if the Tribes asserted their superior right to divert their entire allotted quantity of water from the flow, the state water users would lose water.[145]

D. The Court Erred in Determining that the State Engineer Has Authority to Administer the Tribes' Reserved Water Right on the Reservation

The lower court prohibited the state engineer from regulating water administration on the Wind River Reservation, and allowed the Shoshone and Northern Arapaho Tribes to administer their own water.[146] The Wyoming Supreme Court ruled that the lower court's action was an illegal interference with the executive branch of the state government.[147] The Wyoming Supreme Court restored the engineer's authority over the administration of the reserved water right on the Wind River Indian Reservation.[148]

The Wyoming Supreme Court's action restoring the engineer's authority interferes with tribal government.[149] Both Congress and the United States Supreme Court recognize the tribal right of self-governance on Indian reservations.[150] The right of self-governance necessarily includes freedom from state regulation. The Supreme Court does not allow states to interfere with tribal property or tribal government, absent an express delegation of such power from Congress.[151] The *Big Horn III* court, however, allows the state to interfere with both. The *Big Horn III* decision allows the state engineer to regulate tribal water use, which interferes with tribal property and tribal government.[152]

143. *See supra* note 135.

144. *See Big Horn III,* 835 P.2d 273, 287 (Wyo. 1992) (J. Cardine, concurring in part and dissenting in part).

145. *Id.*

146. District Court Opinion, *supra* note 91, at 17.

147. *Big Horn III,* 835 P.2d at 282.

148. *Id.*

149. This interference ironically is similar to the interference claimed by the Wyoming Supreme Court as the basis for reinstating the engineer, although the interference is now with a different sovereign, on the sovereign's own land.

150. *See supra* text accompanying notes 40-51, 73–80.

151. *See supra* text accompanying notes 50–51.

152. Not only do Indian tribes have the right to self-governance, but experience shows that Indian tribes, as sovereign governments, are capable of independently managing their natural

IV. IMPLICATIONS OF THE WYOMING SUPREME COURT'S ERRORS

The *Big Horn III* court permits state control over the reserved water right belonging to the Shoshone and Northern Arapaho Tribes. The decision contradicts judicial precedent, undermines tribal sovereignty, and defeats the federal goals of tribal self-determination and self-sufficiency by denying tribes the right to use their few remaining resources as they judge best. To achieve economic self-sufficiency, tribes must be able to put their water to economically beneficial uses. *Big Horn III,* however, asserts state control over the Tribes' beneficial use of instream flow. Furthermore, the court's reasoning supports state control over any tribal resource that a state might deem valuable. If the state can assert control over such resources, then the state may place tribes economically second to the state and effectively oppress the tribal economy.[153] States may use their power, as in *Big Horn III,* to divert tribal resources until they are depleted, and thus defeat the goal of tribal self-sufficiency.

State administration of tribal water rights is not only antithetical to self-determination and self-sufficiency, but also denigrates tribal sovereignty. The reserved water right is tribal property.[154] Allowing states to dictate how tribes may develop their property rights disregards the tribes' inherent right to self-governance as sovereign governments. State regulation of tribal water differs dramatically from state regula-

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resources. Other tribes in the western states effectively manage their own water rights. The Yakima Indian Nation, for instance, manages water administration and conservation on the Yakima Reservation. *See* Holly v. Confederated Tribes and Bands of Yakima Indian Nation, 655 F. Supp. 557, 558–60 (E.D. Wash. 1985) (holding that tribes cannot regulate non-Indian use of excess waters, but extent of tribal control over reserved waters is an issue of tribal versus federal control, not state control), *aff'd sub nom.* Holly v. Waston Totus, 812 F.2d 714 (9th Cir.), *cert. denied,* 484 U.S. 823 (1987). Similarly, tribal management of fisheries has also been very successful. Fish runs in Washington, for instance, have grown since the tribes implemented their management systems. *See* FAY G. COHEN, TREATIES ON TRIAL 163–68 (1986).

The Shoshone and Northern Arapaho Tribes, as sovereign governments, are capable of managing their water right. The Tribes have an effective water code. *See, e.g.,* Amicus Curiae Brief of Wyoming Wildlife Federation and National Wildlife Federation at 12, *Big Horn III* (No. 91-83) (on file with the *Washington Law Review*) (comparing the Wind River Water Code to Wyoming law) [hereinafter Amicus Brief]. Their instream flow dedication, based on scientific analysis, is for the benefit of riparian life, including fisheries. *See* Brief of Appellees Shoshone and Northern Arapaho Tribes at 37–38, *Big Horn III* (No. 91-43) (on file with the *Washington Law Review*). The Tribes have proven their dedication to enhancing the ecological well-being of their community through the promulgation of their water code. *See* Amicus Brief at 16. Tribal management, therefore, is not only a right belonging to the Tribes, but is also not a threat to the state's interest in protecting natural resources.

153. See generally Williams, *supra* note 29, for a discussion of the tragic effects of interference with native cultures.

154. *See supra* notes 45–46 and accompanying text.

tion of individual water rights. The states have jurisdiction to regulate each individual state citizen's use of water according to the citizen's determined needs and uses. The state cannot, however, make the same determination on an Indian reservation. Indian tribes on reservations are distinct, self-governing societies. As a tribal society's needs evolve and change, tribal water needs and uses must accommodate the changing needs of tribal members. The self-governing tribe can assess these needs and adjust the allowable water uses. Unilateral state determination of each reservation's water needs and acceptable uses interferes with tribal government.

The *Big Horn III* decision has caused a conflict between federal and state laws. Because more states are beginning to adjudicate Indian water rights, danger exists that other states will use the *Big Horn III* adjudication as precedent for further interference with tribal rights. Federal Indian policy requires that Congress provide for tribal self-governance and protect tribal sovereignty.[155] Thus Congress has a duty to avoid further proliferation of the misapplication of legal doctrines espoused by the *Big Horn III* court. Congress should pass federal legislation to overrule the *Big Horn III* decision, and thereby remove the legal disparity created by the decision.

Congress can provide clear guidance in the application of the legal doctrines entangled in water law adjudications by enacting federal legislation for the administration of Indian reserved water rights. Federal legislation should not only overrule *Big Horn III,* but also clearly state that state law does not apply to Indian reserved water rights. Such legislation would provide uniformity and equity in Indian reserved water law. It would further congressional policy encouraging tribal self-governance and economic self-sufficiency.[156]

V. CONCLUSION

The Wyoming Supreme Court's decision in *Big Horn III* is a step on the road to extinction of tribal sovereignty. The *Big Horn III* court used its jurisdiction under the McCarran Amendment to apply its own state's substantive law on the Wind River Indian Reservation, a use contrary to the purpose of the McCarran Amendment. The *Big Horn III* court also used the federal reserved water rights doctrine in a manner adverse to its purpose and meaning when it misused the reserved

155. *See supra* text accompanying notes 47–49, 70–71.

156. *See* COHEN, *supra* note 18, at 583–84 (arguing that the primary or secondary purpose analysis is inconsistent with federal Indian law and policy).

water rights quantification measures to limit the Shoshone and Northern Arapaho Tribes' use of their own water.

Federal legislation should provide for uniform application of reserved water rights doctrine. The reserved water rights doctrine is federal law, and therefore should not vary from state to state. Federal legislation should also prevent further denigration of tribal sovereignty by asserting tribal self-governing power over reserved water rights. Congress' duty to protect Indian tribes from state control reinforces the need for federal legislation to overrule *Big Horn III.*